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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 673

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

S. WALLACE DEMPSEY,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 673

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner, H. B. Nelson Construction Company, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled case.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 22-24).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 24, 25). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented.

1. Did the court below have jurisdiction to dismiss the petition upon findings for which there is no basis?

2. Was the court's failure and refusal to make special findings of fact requested by petitioner, which are facts upon vital questions and indispensable elements in the case, a violation of this Court's Rule 41?

3. Are the findings of the court below sufficient to sustain judgment for respondent in view of the undisputed facts set out below?

4. Did the court below err in assessing liquidated damages against petitioner?

5. Is petitioner entitled to judgment for the amount asked by him upon the undisputed evidence in the case?

Statement.

Facts Not Disputed.

Harry B. Nelson is an individual, trading under the name of H. B. Nelson Construction Co., named as petitioner herein.

On the 12th of September, 1934, Harry B. Nelson entered into a contract with the United States, numbered NOy-2248, whereby, for the consideration of $275,889.00, he agreed to furnish all labor and materials, and perform all work required for constructing an intermediate and high frequency transmitter building, a low frequency transmitter building, a barracks, a helix house, a pump house, a water tower, two cooling ponds, a settling tank, certain roads and walks, and water, sewerage, drainage and electrical systems, at the Naval Radio Station, Summit, Canal Zone, in accordance with designated drawings and specifications, the work to be commenced within 10 calendar days after date of receipt of

notice to proceed, the buildings and services to be completed within 300 calendar days and all the remaining work within 330 calendar days from the date of receipt of notice to proceed (R. 11, 12).

Notice to proceed with the work was received by the contractor September 26, 1934, thus fixing the final date for completion of the buildings and services July 23, 1935, and of the remaining work August 22, 1935 (R. 12).

The Chief of the Bureau of Yards & Docks, Navy Department, was the contracting officer for the United States (Id.).

Petitioner's bid was based upon the contract, specifications and plans which designated the type of buildings, their locations and all the data necessary to enable the contractor to purchase the materials he needed, and to lay out in advance the course he intended to follow in order to obtain the best and most economical time for starting one class of work following another, and the necessity for providing proper materials in required amounts at the proper times (Plf's. Ex. 101). In preparation for performance the contractor entered into various contracts with suppliers of materials in the United States (R. 12).

Petitioner started erecting the buildings shortly after the notice to proceed was received on September 26, 1934. From November 1934, respondent began making changes, some of which are,—

Petitioner was required to relocate the High and Intermediate Frequency, the Low Frequency and Helix Buildings, with their respective roads and services; change the details of construction in the Helix House; change the interior and exterior details of the Low Frequency Building; provide additional windows and conduit connections at the High and Intermediate Frequency Buildings; omit 3 transformers and provide four laundry tubs in lieu of a scrub deck; provide non-ferrous concrete aggregates for the coil variometer foundations in the Helix and Low Fre-

quency Buildings; provide and install additional ground busses and pipes and three antenna eyes with anchors; complete the road connection at the main station entrance; provide structural steel (instead of wood) (Change Order A; Ct's Find. No. 10; R. 17), supports in the roof trusses of the Helix House for the changed location of the antenna eyes; provide ducts for the parkway lighting cable; provide 50 pairs telephone cables in lieu of the 5 pairs; provide concrete trenches for transformer connections as shown in lieu of steel conduit as planned at the High Frequency Building, and install a duct for electrical connection to the cooling pond motor; provide additional trenches and make changes in others called for in Low Frequency Building (Change Order B; Court's Find. No. 10; R. 18).

Petitioner was required by respondent after buildings were started to tear out and remove parts of the buildings, and change the locations. Petitioner was required to take his men off of work when respondent ordered him not to do it that day, because of an order to change it over to another position. This caused a lot of chaotic conditions on the job; petitioner's men were not satisfied because they did not know what to do. The constant changing of orders upset the order of things. Respondent's plans were not properly prepared, as the buildings were not built as originally laid out. There were changes from day to day. This caused longer time to do the work aside from what petitioner was paid for in the changes s t in the paragraph above (R. 29).

Respondent, in making the changes set out in its Change Orders A and B, would consider the actual time only as to what they would take in time to do the actual work, and did not take into account at all the delay in the job as a whole, in changing from one form of completion to another form of completion (R. 29).

The effect of the changes summarized in Plf's. Ex. 106-A,

Change Order A (R. 17), consisting of about 50 changes (R. 28), covering a period from November 1934 to May 1935, was that it left petitioner with a very unsettled organization, as he did not know what to do next, because respondent would change its mind on what it decided the day before, and the workmen were lost, as they didn't know what respondent wanted to do. That demoralized the workmen because there was so much inconsistency as to the plans and specifications, and was apparently experimental work (R. 30, 31).

These changes brought out a building of a peculiar construction and nature. Respondent would find from time to time that the building would not meet its needs, so it would make changes in relocating them, and in the types of construction (R. 29).

Change Order B is the result of various changes made between May and July 27, 1935, providing additional changes of various kinds and natures in the various buildings, with 15 or 20 individual changes involved in that recapitulation of the changes (R. 29, 18).

From the start of the job, petitioner was given a work order to go ahead, and in a few days given a change order to stop, and then in a few days he was given another change, and that kept on repeating itself for many months, which not only interfered with the purchase of materials, but necessarily increased the costs by reason of the unsettled conditions (R. 30).

The contract provided that changes in excess of $500 must be by a written order (Plf's. Ex. 101, p. 3). The written order for the first changes, Change Order A, was not made until May 8, 1935 (R. 17). Previous to this time petitioner was not required under the contract to make the changes, but he did work though without a full force (R. 31), although he maintained several hundred men on the job (R. 26).

In the high and low frequency buildings there were 50 window frames and contact rolls, and 100 screens to be installed (R. 37). The screens and frames were made by the Truscon Steel Co. (R. 36) according to the drawings with the specifications (Plf's. Ex. 101, Spect. p. 5), and were inspected by the Government inspectors in the United States and approved as required by Section 15-01 of the specifications (Court's Finding No. 3; R. 13). The window frames and contact rolls and screens were installed in the building, and approved by the Government officials (R. 36, 37). Later, a new inspector required petitioner to remove the frames and contact rolls, notch six points on each of the rolls (R. 36), and rebuild (R. 25) and replace them (R. 36). Petitioner had to burn the tops of the metal frames off with an acetylene torch and re-weld the additional members to the frames, which required employing a concern which had burning and welding equipment (R. 25, 31). The specifications did not require the notching (R. 37). Said extra work took 30 days, and cost $1700, which has not been paid (R. 25, 26).

The contract, p. 4 (d), Plf's. Ex. 101, provides:

> "Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, * * *."

The specifications provided that the ceiling was to be put up with bolts (Specifications, Plf's. Ex. 101, Spec. p. 5, R. 38).

On October 25th and 30th, 1934, respondent changed the method of putting up the ceiling, and directed soldering (R. 32; Plf's. Ex. 105-C). November 1, 1934, petitioner replied

that it was almost impossible to solder as respondent directed, but he figured on soldering by the sweat process (Plf's. Ex. 105; R. 34).

The work was not started until after July 24, 1935 (R. 38), and, before starting, petitioner advised respondent that it was impossible to solder by sweating, but respondent ordered him to try (Plf's. Ex. 105-D; R. 39).

After repeated attempts to solder by the sweat method, respondent's officer in charge notified the Bureau in Washington, D. C., that the contractor could not solder by the sweat process, and requested information whether to leave the bolts as he had them on the 12-foot centers (R. 35).

Respondent still insisted on soldering, which petitioner, over his protest, was forced to try again (Plf's. Ex. 105-E; R. 35).

After repeated and unsuccessful attempts to solder, respondent, on November 16, 1935, directed that all solder be omitted, and that bolts be used, *just as the specifications provided* (R. 26, 38, 16).

The officer in charge reported that petitioner had made earnest efforts to sweat the strips on (R. 35, 39, 16).

After the copper ceiling was completed as ordered with bolts, petitioner was ordered to remove the copper ceiling and put in additional bolts (R. 26). Due to respondent's arbitrary orders, changes, errors and demands, petitioner was delayed over 33 days on the Helix House, and put to extra expenses of $1920 for which he was not paid (R. 26), but, was erroneously charged with liquidated damages for the delay (Plf's. Ex. 107). The construction of this ceiling involved unusual questions (R. 29, 38).

The contract required, and the officer in charge arbitrarily and through bad engineering ordered that a ten ton roller be used after the road bed was constructed and crushed rock was on it (R. 16, 27; Plf's. Ex. 101, Spec. p. 15).

The roller was far too heavy, and seriously damaged the work done, and resulted in petitioner being forced to rebuild parts of said road. It would bury the rock into the mud, resulting in a loss and replacement of about one-third of the rock in the bed of the road. It caused the road to curl up in front of the roller and necessitated a great deal of re-rolling, cross rolling and hand tamping, and resulted in 30 days of extra work. The extra rock cost over $4000, and the extra rental for a roller was over $1500, making together $5500, which has not been paid, and which petitioner is entitled to recover (R. 27).

Respondent failed within a reasonable time to inspect and approve certain lavatories (Plf's. Exs. 104-A to W). It rejected them July 19, 1935, but later and not till September 30th it approved them as first submitted (Plf's. Ex. 106-M; Deft's. Ex. in Court's Finding No. 12; R. 20), making a delay of 65 days. This delay increased the costs as it was necessary to hold experienced mechanics on the job until they arrived, which was after the contract completion date. These workmen had work which had to be done after the lavatories were in place (R. 31; Plf's. Ex. 106-M).

Respondent had petitioner put in additional trenches and cover plates for trenches. This work in the low frequency building caused a delay of 2 or 3 days as the plates had to be made (Plf's. Ex. 106-N; R. 26).

Respondent's failure to approve the pumps from Oct. 21 to Nov. 2, 1935, caused a delay of 12 days, during which time petitioner had to keep experienced men on the job for the test (Plf's. Ex. 106-E). The extra expense of the pump men was $75.00 per week (R. 28). Petitioner duly protested this delay (Plf's. Ex. 106-E, 106-H).

Respondent received samples of the putty September 19th, but did not release it for shipment until October 2nd (R. 14), a delay of 13 days.

As a result of the arbitrary and unnecessary delays and mistakes made by respondent, and of the extra work caused thereby, petitioner was unable to complete the work within the time specified by the contract, and was necessarily engaged in completing it extra time (R. 25-31), as follows, (a) the low and high frequency buildings, 36 days; (b) the Helix House, 33 days; (c) the Barracks, 57 days; and (d) the other structures—the roads and the remaining work—2 days, all of which is in addition to the extra time allowed by respondent (Plf's. Ex. 107). Petitioner would have completed the contract within the time specified in the contract and made a reasonable profit of 10% except for the delays caused by respondent (R. 28).

Respondent, on making petitioner his final payment, erroneously and illegally deducted $2490 as liquidated damages, which petitioner duly protested (Deft's. Ex. AA; R. 30).

Petitioner protested repeatedly during the progress of the work to respondent that the contract price, and that arbitrarily fixed for extra work required by respondent's changes, mistakes, delays, and the time for doing the contract work with the extra work were all of them inadequate (R. 30; Plf's. Exs. 105D and E, 106-C-D-E-F-G-J-L-N; 104-M-R-U-W).

No action had been taken in regard to the above protests when the release was made (R. 30).

Petitioner was obliged to accept said terms imposed by respondent and the payment tendered because he had to have payments for the additional work and for work specified in the contract, to enable him to meet his payroll (R. 30) of several hundred men (R. 26), and other expenses, and the respondent arbitrarily refused to make any payments made unless petitioner accepted them in full (R. 30), as expressed by Commander Fogg "no change order, no money". Petitioner had exhausted his own means through

the multitude of changes and consequent delays and greatly increased costs (Plf's. Exs. 102, 103; R. 28, 29).

The additional price named in the change orders and paid covered only the cost of work and material made necessary by those changes, and included nothing for the additional and extra costs caused by and directly resulting from the change order delays and from the day to day minor changes made throughout the approximately 400 day period the work lasted, for which petitioner was in no wise responsible (R. 29).

The necessary costs of the construction work as shown by petitioner's checks and vouchers (Plf's. Exs. 102, 103) was $322,030.40. Ten per cent profit on the cost would amount to $32,203.04, and one and one-half per cent for the bond would have amounted to $5,313.50. The contract price plus what respondent allowed for extras amounted to $287,842.71, leaving the total amount now due petitioner $71,704.19 (R. 28).

Specification of Errors to be Urged.

Petitioner urges that the Court of Claims erred in failing and refusing to find the following Findings of Fact requested by petitioner, viz.:

I.

(1) The construction of the radio buildings, as the high and low transmitter buildings, and the helix house, was substantially and practically changed as to the whole work to be done, as shown by the many changes in the change orders made from the time the work commenced (R. 17, 18).

(2) From the start of the job petitioner was required to make many changes from day to day in addition to the 65 changes made in change orders A and B (R. 29). This created an unsettled condition, and increased costs and

delays (R. 28-31). Petitioner had to remove parts of buildings and change their locations, resulting in the buildings not being built as provided for in the contract (R. 28, 29). Although the contract provided that no change in excess of $500 was to be made until there was a written order, which was not made until May 8, 1935, respondent required petitioner to make various changes before the written order was received to prevent additional delays as much as possible (R. 31).

Virtually, petitioner could do nothing when notified of a change to be made until the change order of May 8th was received. However, he did work, but was prevented at times from working a full force, although he maintained several hundred men on the job (R. 30, 31, 26).

(3) The Government buildings, by the constant day by day changes from the specifications, were actually constructed as *experimental*, new kind of buildings of a particular construction (R. 29). Petitioner did not know what to do next, as respondent's officials would change their minds on what they decided the day before. Such inconsistency was demoralizing to the workmen (R. 28, 29), took extra time in changing from one form of completion to another, and made extra expenses (R. 28, 29).

(4) Respondent failed within a reasonable time to inspect and approve certain lavatories (Plf's. Exs. 104-A to W). It rejected them July 19, 1935, but later and not till September 30th it approved them as first submitted (Plf's. Ex. 106-M; Deft's. Ex. page 10 of Court's Finding No. 12; R. 20), making a delay of 65 days. This delay increased the costs as it was necessary to hold experienced mechanics on the job until they arrived, which was after the contract completion date. These workmen had work which had to be done after the lavatories were in place (R. 31; Plf's. Ex. 106-M).

(5) Respondent had petitioner put in additional trenches, and cover plates for trenches. This work in the low frequency building caused a delay of 2 or 3 days as the plates had to be made (Plf's. Ex. 106-N; R. 26).

(6) In the high and low frequency buildings there were 50 window frames and contact rolls, and 100 screens to be installed (R. 37). The screens and frames were made by the Truscon Steel Co. (R. 36) according to the drawings with the specifications (Plf's. Ex. 101, Spect. p. 5), and were inspected by the Government inspectors in the United States and approved as required by Section 15-01 of the specifications (Court's Finding No. 3; R. 13). The window frames and contact rolls and screens were installed in the building, and approved by the Government officials (R. 36, 37). Later, a new inspector required petitioner to remove the frames and contact rolls, notch six points on each of the rolls (R. 36), and rebuild (R. 25) and replace them (R. 36). Petitioner had to burn the tops of the metal frames off with an acetylene torch, and re-weld the additional members to the frames, which required employing a concern which had burning and welding equipment (R. 25, 31). The specifications did not require the notching (R. 37). Said extra work took 30 days, and cost $1700, which has not been paid (R. 25, 26).

The contract, p. 4 (d), Plf's. Ex. 101, provides:

> "Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, * * *." (Plf's. Ex. 101).

(7) The specifications provided that the ceiling was to be put up with bolts (Specifications; Plf's. Ex. 101, p. 5, R. 38).

On October 25th and 30th, 1934, respondent changed the method of putting up the ceiling, and directed soldering (R. 32; Plf's. Ex. 105-C). November 1, 1934, petitioner replied that it was almost impossible to solder as respondent directed, but he figured on soldering by the sweat process (Deft's. Ex. HH; R. 34).

The work was not started until after July 24, 1935 (R. 38), and, before starting, petitioner advised respondent that it was impossible to solder by sweating, but respondent ordered him to try (Plf's. Ex. 105-D; R. 39).

After repeated attempts to solder by the sweat method, respondent's officer in charge notified the Bureau in Washington, D. C., that the contractor could not solder by the sweat process, and requested information whether to leave the bolts as he had them on the 12-foot centers (R. 35).

Respondent still insisted on soldering, which petitioner, over his protest, was forced to try again (Plf's. Ex. 105-E; R. 35).

After repeated and unsuccessful attempts to solder, respondent, on November 16, 1935, directed that all solder be omitted, and that bolts be used, *just as the specifications provided* (R. 26, 38, 16).

The officer in charge reported that petitioner had made earnest efforts to sweat the strips on (R. 35, 39, 16).

After the copper ceiling was completed as ordered with bolts, petitioner was ordered to remove the copper ceiling and put in additional bolts (R. 26). Due to respondent's arbitrary orders, changes, errors and demands, petitioner was delayed over 33 days on the Helix House, and put to extra expenses of $1920 for which he was not paid (R. 26), but, was erroneously charged with liquidated damages for the delay (Plf's. Ex. 107). The construction of this ceiling involved unusual questions (R. 29, 38).

(8) The contract required, and the officer in charge arbitrarily and through bad engineering ordered that a ten ton

roller be used after the road bed was constructed and crushed rock was on it (R. 16, 27; Plf's. Ex. 101, Spec. p. 15). The roller was far too heavy, and seriously damaged the work done, and resulted in petitioner being forced to rebuild parts of said road. It would bury the rock into the mud, resulting in a loss and replacement of about one-third of the rock in the bed of the road. It caused the road to curl up in front of the roller and necessitated a great deal of rerolling, cross rolling and hand tamping, and resulted in 30 days of extra work. The extra rock cost over $4000, and the extra rental for a roller was over $1500, making together $5500, which has not been paid, and which petitioner is entitled to recover (R. 27).

(9) Respondent's failure to approve the pumps from Oct. 21 to Nov. 2, 1935, caused a delay of 12 days, during which time petitioner had to keep experienced men on the job for the test (Plf's. Ex. 106-E). The extra expense of the pump men was $75.00 per week (R. 28). Petitioner duly protested this delay (Plf's. Ex. 106-E, 106-H).

(10) Respondent received samples of the putty September 19th, but did not release it for shipment until October 2nd, R. 14),—a delay of 13 days.

(11) As a result of the arbitrary and unnecessary delays, and mistakes made by respondent, and of the extra work caused thereby, petitioner was unable to complete the work within the time specified by the contract, and was necessarily engaged in completing it extra time (R. 25-31) as follows; (a) the low and high frequency buildings, 36 days; (b) the Helix House, 33 days; (c) the Barracks, 57 days; and (d) the other structures,—the roads and the remaining work, —2 days, all of which is in addition to the extra time allowed by respondent (Plf's. Ex. 107). Petitioner would have completed the contract within the time specified in the contract

and made a reasonable profit of 10% except for the delays caused by respondent (R. 28).

(12) Respondent, on making petitioner his final payment, erroneously and illegally deducted $2490 as liquidated damages, which petitioner duly protested (R. 30; Deft's. Ex. AA).

(13) Petitioner protested repeatedly during the progress of the work to respondent that the contract price, and that arbitrarily fixed for extra work required by respondent's changes, mistakes, delays, and the time for doing the contract work with the extra work were all of them inadequate (R. 30; Plf's. Exs. 105D and E, 106-C-D-E-F-G-J-L-N; 104-M-R-U-W).

No action had been taken in regard to the above protests when the release was made (R. 30).

Petitioner's letter of Sept. 16, 1935, (Plf's. Ex. 106-C), to the Commandant, 15th Naval District, as to the delay caused by respondent's failure to inspect and ship the glass, putty and plumbing material was not answered until Feb. 7, 1936, almost 2 months after the release was executed.

Petitioner's letter of Oct. 16, 1935 (Plf's. Ex. 105-D), to the District Public Works Office protesting the extra work required by respondent's officer, and requesting extra pay, was not answered.

Petitioner's letter of Oct. 21 (Plf's. Ex. 105-E) to District Public Works Officer again protesting about the copper work in the Helix House, stating that although it was completed Oct. 10, 1935, respondent's officer had ordered the copper changed which would require additional work and time, was not answered.

Petitioner's letter of October 21, 1935 (Plf's. Ex. 106-E), protesting the delay caused by failure to furnish a portable power plant was not answered until Feb. 7, 1936.

(14) Petitioner was obliged to accept said terms imposed by respondent, and the payment tendered because he had to have payments for the additional work, and for work specified in the contract, to enable him to meet his payroll (R. 30) of several hundred men (R. 26), and other expenses, and the respondent arbitrarily refused to make any payments made unless petitioner accepted them in full (R. 30), as expressed by Commander Fogg 'no change order, no money.'' Petitioner had exhausted his own means through the multitude of changes and consequent delays and greatly increased costs (Plf's. Exs. 102, 103; R. 27, 28).

(15) The additional price named in the change orders and paid covered only the cost of work and material made necessary by those changes, and included nothing for the additional and extra costs caused by and directly resulting from the change order delays and from the day to day minor changes made throughout the approximately 400 day period the work lasted, for which petitioner was in no wise responsible (R. 29).

(16) The necessary costs of the construction work as shown by petitioner's checks and vouchers (Plf's. Exs. 102, 103), was $322,030.40. Ten per cent profit on the cost would amount to $32,203.04, and one and one-half per cent for the bond would have amounted to $5,313.50. The contract price plus what respondent allowed for extras amounted to $287,842.71, leaving the total amount now due petitioner $71,704.19 (R. 28).

II.

The court erred in making the following Special Findings of Fact:

(1) ''The work that plaintiff did on the screens was necessary in order to make them conform to the specifications, and the fitting of the screen to its window was

a hand-fitting job that could only be performed at the site." (Finding 3; R. 13).

(2) "There was no delay on the part of the Government in inspection and release for shipment of the * * * putty to the site of the work." (Finding 4; R. 14).

(3) "On September 27, 1935, the manufacturer informed the inspector that the lavatories were ready for inspection."

"They were received * * * without delaying the completion of those buildings."

"There was no delay on the part of the Government in inspection of the lavatories." (Finding 5; R. 15).

(4) Finding 7, except Section 8-01 of the Specifications (R. 15, 16).

(5) "There is no proof that the contractor was required to do more than provided for by his contract." (as to the road and roller). (Finding 8; R. 16).

(6) "The contractor was ready to make the test" (for the pumps) "in the latter part of October, 1935." (Finding 9; R. 17).

III.

The Court of Claims erred in making the following Conclusions of Law:

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed (R. 22).

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law (R. 22).

IV.

The Court of Claims erred in making the following Findings in its Opinion:

"The facts show that all these changes which were made were provided for in the contract, and that plain-

tiff accepted the Change Orders, performed the work, received the compensation as fixed in the Change Orders and that the time for completion of the contract was extended by the allowance of additional days. In addition to this, plaintiff's release to defendant of all claims is a complete defense to any action for recovery under the contract except as to the items which had been specifically excepted in the release." (R. 23).

"The evidence discloses that inspection was made within a reasonable time and, if there were any delays, plaintiff contributed to them by its failure to give the proper information to the manufacturer from whom the glass and putty had been purchased by it." (R. 23).

"It is also contended that the Government delayed plaintiff in not properly inspecting the plumbing fixtures, but the facts show that the completion of the buildings was not delayed because of a slight delay in inspection." (R. 23).

"The inspection in the United States was purely one of materials. The contract required that the screens should fit the windows in such a way as to prevent insects from entering the building but after the arrival of the screens it was found that certain adjustments had to be made in order to make them bugproof. It was part of the contract that plaintiff should perform this work. We can find no variance from the specifications in requiring plaintiff to fit the screens to the windows. (R. 24).

"There are other allegations of delay on the part of the Government in reference to road-building and furnishing electricity, and the covering of the ceiling of the helix house with copper sheeting, which we do not think it necessary to discuss at length. (*Id.*).

"The facts in the case show that the Government complied strictly with the terms of the contract and that plaintiff was not delayed by any act of the Government for which it was not allowed an extension of time and an increase in the contract price. (*Id.*).

"The delays for which plaintiff has had liquidated damages assessed against it were caused by its own

failure to comply with the terms of the contract. (*Id.*).

"Plaintiff's petition is dismissed. It is so ordered." (*Id.*).

Reasons for Granting the Writ.

(1) The Court of Claims failed and refused to make petitioner's requested Special Findings of Fact which are upon vital questions and are indispensable elements in the case, and not in dispute, in disregard of Rule 41 of the United States Supreme Court. The requested Special Findings of Fact are set out under Point I in the Specification of Errors to be urged, and are sufficient to entitle petitioner to judgment under the authorities of this Court, and all other authorities, as follows:

(a) Respondent made 50 major change order changes, each involving over $500—one every third day for five months of the performance of the work—and 15 to 20 major changes from May to July 27th—one every fourth day—and it made additional minor changes from day to day throughout the 400 days the work was in progress, whereby the work was so substantially and materially departed from as to amount to a constructive abandonment of its terms and specifications, and advance planning of the work was made impossible; chaotic conditions resulted and the order of doing the work was upset; delays were caused by changing from one form of completion to another; petitioner's men became demoralized and dissatisfied, and petitioner was obliged to wait for change orders, and was thereby made unable to work a full force, although he had several hundred men on the job, and the changes bothered, too, on the purchase of materials, and coordination of men and materials was made impossible and the constant changes broke the morale of petitioner's force, as more particularly shown under subdivisions (1) to (3) inclusive of Point I of the Specifications of Errors, all of which delays and changes

resulted in a large increased cost, the total cost being $322,030.40, on which there has been paid $287,842.71, leaving unpaid thereon $71,704.19, for which sum petitioner is entitled to judgment (R. 28), and the refusal of the court to grant such judgment was erroneous and in conflict with the decisions of this Court and of the prior decisions of the court below. (*U. S.* v. *Behan,* 110 U. S. 338; *U. S.* v. *Spearin,* 248 U. S. 132; *U. S.* v. *Barlow,* 184 U. S. 123, 135, 136, 137; *Rust Engineering Co.* v. *U. S.,* 86 Ct. Cls. 461; *Phoenix Bridge Co.* v. *U. S.,* 85 Ct. Cls. 603; *Kellog Bridge Co.* v. *U. S.,* 15 Ct. Cls. 206; *Sobel* v. *U. S.,* 88 Ct. Cls. 149, 165; *Montrose Contracting Co.* v. *Westchester County,* 94 F. (2d) 580, 584; *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201; *Henderson Bridge Co.* v. *McGrath,* 134 U. S. 260; 9 C. J. § 55, p. 722; Industrial Housing by Knowles, p. 34; Waste in Industry, p. 72).

(b) Because the Court below refused to recognize the approval by the Government inspectors in the United States of the window frames, screens, and contact rolls in the high and low frequency buildings as final, although the alleged defect was a visible and not a latent one, and refused to find that petitioner was entitled to an extension of time and compensation because respondent required petitioner to burn off the metal joining the screens and certain contact rolls, and to make six notches in each roll, and to rebuild the screens, which was not required by the contract, taking 30 days extra time and costing $1700, which has not been paid, as fully described in subdivision (6) of No. I of the Specifications of Errors, which rulings of the Court are in conflict with the contract and with the decisions of this Court, and the previous decisions of the Court below, which hold that petitioner was bound to do only what the specifications required, and respondent is liable for the cost of additional

work necessary to complete the job. (*Hollerback* v. *U. S.*, 233 U. S. 165; *Christie* v. *U. S.*, 237 U. S. 234; *U. S.* v. *Utah N. & C. Stage Co.*, 199 U. S. 414; *U. S.* v. *Spearin*, 248 U. S. 132; *Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls. 475; *Sobel* v. *U. S.*, 88 Ct. Cls. 149).

(c) Because the Court below found contrary to the fact that the contractor has been paid for installing the ceiling in the Helix House on the basis of the sweating process by receipt of $1671, whereas this payment was determined on in advance of the work, and was to cover a change from 14-ounce to 45-ounce copper, and in changing wood for steel supports, and the additional work resulting therefrom (far the greater part of the anticipated work and expense), as well as what was expected to be the small difference between bolting and soldering, and because the Court erroneously found that the soldering process was not satisfactory, in face of and contrary to its own finding that the first effort was unsatisfactory, and on the next the same trouble was experienced, and contrary also to the finding of respondent's officer in charge that the ceiling could not be put up by the sweating process despite petitioner's earnest efforts, and despite the abandonment of this process by respondent (R. 34); and because the Court refused to find the fact that after the ceiling was completed with bolts as directed, respondent required petitioner to remove it and put in additional bolts; and because the Court refused to find that petitioner was delayed 33 days on this work, and paid about $1920 extra expense or that he was entitled to recover therefor and was erroneously charged with liquidated damages for delay, as fully described in subdivision (7) of Point I of the Specification of Errors, and contrary to the proof and to the decisions of this Court and of the Court below, under the decisions cited above.

(d) Because the Court below erroneously refused to hold (R. 16) that petitioner is entitled to recover a loss of $5500 and the value of 30 days of extra work, and of the delay to the work as a whole, which he suffered through respondent's requiring him to use too heavy a roller to roll the surface of a road even which he had constructed in accordance with respondent's specifications, and finished except for such rolling, (Specification of Error No. 8, Point I), despite said Court having found and held that the road curled up before said roller, and that it crushed rock into the mud so that petitioner had to use more rock after and because of such use, and that the roller was somewhat lighter than the specifications as to the weight of the roller provided, from which said Court erroneously concluded and held that the specification was binding, and that petitioner was obliged to furnish whatever extra stone was made necessary through its use, and to rebuild the torn up road (No. 8), instead of holding, as required by the decisions of this Court, that the specification of the weight of the roller to be used (No. 8) was a warranty that such a roller would be of the proper weight, and that petitioner was not required to rebuild a road completed as required, but torn up afterwards by too heavy a roller, which respondent required him to use, and that he was entitled to judgment for the $4000 paid out for extra rock, and $1500 for extra rental of a roller, besides the value of thirty extra days of work made necessary, and the loss through the resulting delay to the work as a whole, (Specification of Error No. 8, Point I). This finding, and refusal to find, is in conflict with the provisions of the specifications, and the decisions of this Court, and the Court of Claims under the decisions cited above.

(e) The Court below refused to find the ultimate facts that respondent caused certain delays shown under Point

I, subdivisions 4, 5, 9 and 10 of the Specification of Errors, as to inspecting lavatories, making extra trench plates, and inspecting the pumps, and putty, in conflict with the decisions of this Court cited in *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201.

(f) It is undisputed that there were many changes made both under change orders (R. 17, 18) and from day to day by respondent, as shown under Point I of the Specification of Errors, causing constant delays in the progress of the work, yet the Court below refused to find that petitioner was not liable for liquidated damages, which is in conflict with the decisions of this Court and the Court below. (*U. S.* v. *United Eng. Co.,* 234 U. S. 236; *Standard Steel Co.* v. *U. S.,* 67 Ct. Cls. 445; *Greenfield Tap & Die Corp.* v. *U. S.,* 68 Ct. Cls. 61; *Christensen Constr. Co.* v. *U. S.,* 72 Ct. Cls. 500; *Bethlehem Steel Co.* v. *U. S.,* 75 Ct. Cls. 845).

(2) The Court of Claims erred in making the Special Findings of Fact set out under Point II of the Specification of Errors, all of which are plainly without support in the evidence. These findings are in conflict with the decisions of this Court in *General Talk. Pictures Corp.* v. *Western El. Co.,* 304 U. S. 175, 178.

Conclusion.

The Findings of the Court of Claims set out in Point II of the Specifications of Errors to be urged, are not the ultimate facts. Such facts are set out as errors for failure to find under Point I. As respondent put in issue all the allegations of the complaint by its general traverse, the findings in order to be sufficient to sustain judgment must specifically decide all the questions, which are mainly:

(a) Did the 65 major changes—one every third day for five months, and one every fourth day for the rest of the

time the work was in progress—and minor changes from day to day and the delays necessarily resulting therefrom, (making it impossible to plan in advance, and demoralizing the men, and making it impossible for petitioner, with hundreds of men employed, to work a full force while waiting for change orders, as he frequently had to do, as described in detail in Point I, subdivision (b) of the Specification of Errors), amount to an abandonment of the contract, entitling petitioner to recover on a *quantum meruit*?

(b) The Court found that certain screens were inspected and approved by the respondent's inspectors in the United States, but that the local inspector required them to be materially altered (R. 13). The alleged defect was a space of 3/8 of an inch between the window and screen, and was visible. The contract, page 4, provided that the approval after inspection in the United States was final, except as to latent defects (Plf's. Ex. 101, p. 4). The two ultimate questions remain which the Court below failed to decide—was there such a provision in the contract, and was it binding, entitling petitioner to recover the value of the extra work?

(c) Respondent required petitioner to experiment with a method of putting up the ceiling in the Helix House, different from the specifications, which, after many earnest efforts by petitioner, proved impossible, and was abandoned by respondent, and after the ceiling had been put up with bolts, as respondent directed it, required him to tear it down, and put it up again in a different way. While, as found, petitioner was made an allowance in advance for soldering the ceiling when both parties supposed this to be practicable, he was not paid for the repeated attempts after it proved impracticable which respondent required, or for tearing down the ceiling when put up as ordered, and putting it up again. The ultimate questions remain whether

petitioner is entitled to recover what he has not been paid for the experimental work and for tearing down the ceiling after installed as required, and putting it up again.

(d) Respondent required petitioner to use too heavy a roller in rolling a road constructed and completed, except for such rolling in accordance with the specifications, resulting in tearing up the road, and a $4000 loss paid for extra rock, and $1500 for a roller for extra time. The Court below (it appears by inference), held that the specifications prescribed the weight of the roller and are binding. The ultimate question is—did specifying the weight of the roller amount to a warranty that it would be proper for the work, and as it proved far too heavy, is petitioner entitled to recover his loss of $5500 expended for rock and roller rental, plus the value of the extra work made necessary?

(e) Was petitioner released from paying liquidated damages on account of the extended delays resulting from the multitude of changes?

(f) What was the necessary cost expended by petitioner? What amount is petitioner entitled to recover?

The Court of Claims is also required but failed to include circumstantial facts sufficient to warrant its conclusion in respect to the main issues.

The failure to find such ultimate and circumstantial facts in respect to the main issues is in conflict with Rule 41 of this Court, and *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201.

The failure of the lower Court to make specific findings upon the main issues entitles petitioner to a writ of certiorari, as this Court may now, under the Act approved May 22, 1939, amending subsection b of section 3 of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, Title 28, Sec. 288b), examine, analyze, and compare the circumstantial facts found, with the evidence brought up, to

ascertain whether as matter of law petitioner is entitled to judgment.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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